LIBRARY
SUPREME COURT, U. S.

FILED
OCT 14 1969
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 603

ROBERT L. DOWELL, an infant, who sues by A. L. DOWELL, his father and next friend, *et al.*,

and

STEPHEN S. SANGER, JR., on behalf of himself and all others similarly situated,

Petitioners,

VERSUS

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, *et al.*,

and

JENNY MOTT McWILLIAMS, a minor, and DAVID JOHNSON McWILLIAMS, a minor, who sue by WILLIAM ROBERT McWILLIAMS, their father and next friend, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS McWILLIAMS, ET AL., IN OPPOSITION

V. P. CROWE
100 Park Avenue Building
Oklahoma City, Oklahoma 73102
Counsel of Record for Respondents McWilliams, et al.

of Counsel:
C. HAROLD THWEATT
GEORGE S. CLOVER
GEORGE F. SHORT
NORMAN E. REYNOLDS

October, 1969

OKLAHOMA LITHOGRAPHING CO., 810 W. EAST, OKLAHOMA CITY, PH. CE 8-0580

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Reasons the Writ Should Not Be Granted	7
1. The decision of the court below is not in conflict with any decision of this Court	7
2. The court of appeals has decided no important question of federal law	8
3. No Judge of the panel below was disqualified	12
Conclusion	16

TABLE OF AUTHORITIES

Cases:

American Construction Co. v. Jacksonville, T.&K. W.R. Co., 148 U.S. 372 — 9

Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964) — 11

Cobbledick v. United States, 309 U.S. 323 — 9

Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967) — 11

Dowell v. School Board of Oklahoma City Public Schools, 219 F.Supp. 427 (W.D. Okla. 1963) — 13

Goss v. Board of Education of Knoxville, Tennessee, 406 F.2d 1183 (6th Cir. 1969) — 11

Green v. School Board of New Kent County, Virginia, 391 U.S. 430 (1968) — 11

TABLE OF AUTHORITIES CONTINUED PAGE

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 9

Keyes, et al. v. School District Number One, Denver, Colorado, et al., not yet reported; opinion of Mr. Justice Brennan in Chambers, Aug. 29, 1969 9

Lee v. United States, 91 F.2d 326 (5th Cir. 1937), cert. denied, 302 U.S. 745 (1937) 14

Monroe v. Board of Commissioners of the City of Jackson, Tenn., 391 U.S. 450 (1968) 11

Moran v. Dillingham, 174 U.S. 153 (1899) 14

O'Rourke, et al. v. Levine, 80 S.Ct. 623, 4 L.Ed.2d 615 8-9

Raney v. Board of Education of the Gould School District, 391 U.S. 443 (1968) 11

Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339 (1913) 13

Springfield School Committee v. Barksdale, Jr., et al., 348 F.2d 261 (1st Cir. 1965) 11-12

United States v. Perlstein, 126 F.2d 789 (3rd Cir. 1942), cert. denied, 316 U.S. 678 (1942) 14

Wanner v. County School Board of Arlington County, Va., 357 F.2d 452 (4th Cir. 1966) 11

Wm. Cramp & Sons S.&E.B. Co. v. International Curtis Marine Turbine Co., 228 U.S. 645 (1913) 14-15

STATUTES:

28 U.S.C. §47 12

28 U.S.C. §1254(1) 15

Civil Rights Act of 1964, 42 U.S.C.A. §2000c-6(a), 78 Stat. 248 7

RULES:

Federal Rules of Appellate Procedure, Rule 8 10

Federal Rules of Civil Procedure, Rule 62(g) 10

Rules of the Supreme Court, Rule 20 15

In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 603

ROBERT L. DOWELL, an infant, who sues by A. L. DOWELL, his father and next friend, *et al.*,

and

STEPHEN S. SANGER, JR., on behalf of himself and all others similarly situated,

Petitioners,

VERSUS

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, *et al.*,

and

JENNY MOTT McWILLIAMS, a minor, and DAVID JOHNSON McWILLIAMS, a minor, who sue by WILLIAM ROBERT McWILLIAMS, their father and next friend, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS McWILLIAMS, ET AL., IN OPPOSITION

OPINIONS BELOW

The Petition for the Writ adequately shows the Opinions and Orders below.

JURISDICTION

The Petition for the Writ shows the jurisdictional grounds.

QUESTIONS PRESENTED

1. Whether a Writ of Certiorari should issue to review a stay order of the court of appeals where:

In the late spring of 1969, the Oklahoma City School Board, which was under the continuing jurisdiction of the district court, decided that it was not then feasible to make changes in existing school attendance boundaries in an attempt to achieve racial balance. The school board decided that racial balance could be obtained by an active recruitment program in implementation of the existing majority to minority transfer policy. The school board had been urged to make attendance boundary changes solely for the purpose of assigning more white students to the four fully integrated paired schools. The trial judge forced boundary changes upon the school board designed to establish a greater ratio of whites to blacks in two of the paired schools, namely, Harding and Northeast. The boundary changes, because of the distances involved, required transportation. The order forced white and black children to attend schools far more distant than the ones they otherwise would attend. Because of the constitutional and legal questions raised by the affected students, and the imminence of the 1969-70 school term, the court of appeals stayed the order of the trial judge until a complete desegregation plan scheduled for presentation by November 1, 1969, had been considered by the trial court. The court

of appeals stated it would expedite any appeal respecting the comprehensive plan.

We do not agree with Petitioners that a question is presented: "Whether Negro pupils have been denied Fourteenth Amendment rights to attend desegregated public schools. . . ."

2. Whether Chief Judge Murrah was disqualified to sit on the panel that stayed the trial court's order.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves only the correctness of a stay order issued by the court of appeals. No constitutional provisions or statutes are directly involved in this proceeding.

STATEMENT OF THE CASE

The only facts pertinent to the issue raised by the Petition for the Writ are those which relate to the order of August 13 entered by the district court (Appendix, 35a)[1] and the stay order entered by the Tenth Circuit (Appendix, 38a). On June 12, 1969, the school board routinely reported to the trial court its Plan for the 1969-1970 year (Appendix, 13a) in which, among other things, it stated that boundary changes in an attempt to achieve racial balance are not feasible at this time and stated its opposition to mandatory or forced bussing of pupils (Appendix, 19a). This plan was

[1] All references herein to the Appendix are to the Appendix to the Petition for a Writ of Certiorari

a further implementation of the previously approved Plan in operation. The court allowed interested parties 20 days from that date to respond. No response was made by Plaintiff Dowell. Plaintiff Sanger, a white intervenor, responded in opposition to the Plan apparently because it did not make boundary changes that would include more white students in the attendance areas of four schools previously paired by an order of the district court. The McWilliams class intervened as of right in support of the school board plan and against boundary changes resulting in compulsory transfers to achieve a racial balance.[2] After a pretrial, the trial court ordered Respondents' Complaint in Intervention stricken for failure of counsel to waive Respondents' right of appeal from any order of the trial court, and Respondents sought a writ under Rule 21(a), Federal Rules of Appellate Procedure.[3] Upon hearing, the court of appeals found Respondents were entitled to intervene as of right and vacated the trial court order striking their Complaint.[4]

Trial was had. The court ordered the school board to prepare a supplement to its Plan that would make boundary changes designed to increase the white to black ratio in Harding Junior and Northeast High Schools.

---

[2]The Motion for Leave to Intervene, with Leave Granted to Intervene endorsed thereon, and the Complaint in Intervention are attached as Exhibit 5 to Respondents' Petition for Writ under Rule 21(a) in No. 348-69 in the court of appeals following page 3 of the Supplemental Certiorari Record filed by Petitioners.

[3]See record on appeal in No. 348-69 in the court of appeals indexed as page 3 of the Supplemental Certiorari Record filed by Petitioners.

[4]The Order is attached as Exhibit 1 to Respondents' Motion for Stay Pending Appeal in No. Misc. 474 in the court of appeals indexed as page 3 of the Certiorari Record filed by Petitioners.

Acting in response to the instructions of the court (Appendix, 20a), the board filed a boundary change supplement which made more extensive boundary changes than that proposed by the Sanger Intervenors at the trial, and which affected hundreds of pupils not previously affected. This Supplemental Plan was forthwith approved by the trial court without a hearing (Appendix, 9a, 11a). It was made effective for the 1969-1970 school year. Three elementary attendance areas and portions of two others were added to the Harding-Northeast schools. Additionally, 109 black students in the 10th and 11th grades in the Longfellow attendance area were transferred from Northeast High School, causing them to be transported without their consent a distance from five and one-half to seven miles across the City of Oklahoma City to a predominantly white school in a noncontiguous attendance area with all the attendant hazards and dangers of transportation (Appendix, 20a).

In the same order the court directed the school board to file a comprehensive Plan by November 1, 1969.

The McWilliams class asked the court of appeals to stay that part of the trial court's order effecting the boundary changes and transfers. The court of appeals had the benefit of all briefs available to the trial court, heard unlimited oral argument on two occasions and had before it a record sufficient to enable it to make an informed judgment as to the questions raised by the request for a stay. The court of appeals stayed and vacated the trial court's order insofar as it pertained to the boundary changes, pointing out that any appeal after the comprehensive Plan had

been presented as ordered by the trial judge would be procedurally expedited (Appendix, 38a).

Although the trial court made no findings of fact and conclusions of law, the oral remarks of the trial judge which were before the court of appeals when it was considering the application for a stay (Appendix, 1a-10a) show that the trial judge found that the school board was acting in good faith (Appendix, 1a, 5a) and show that the boundary changes which were forced on the school board by the trial court were for the sole purpose of establishing an increased ratio of whites to blacks in Harding Junior High School and Northeast High School (Appendix, 5a-6a, 9a). There was no finding or suggestion that, following an earlier decision of the court of appeals in the same case, existing attendance boundaries had been drawn in bad faith or to further and perpetuate racial discrimination.[5] Indeed, there is no finding at all by the court of any purposeful segregation by the school board. One of the school board members pointed out to the trial judge that the court was giving the school board no opportunity to demonstrate that the plan it had proposed and submitted to the court for active recruitment of majority to minority transfers would in practice work (Appendix, 7a).

---

[5]In its opinion, the court of appeals stated: "The majority to minority transfer plan, in conjunction with the attendance boundary plan, eliminates any question about Constitutional infirmities of the attendance boundary plan being followed in Oklahoma City." *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F.2d 158, 166 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967).

At page 6a, Appendix, the trial court stated:

> "The Court holds and finds that this School Board must, within a period between now and October 30th, prepare and submit to the people a long range integration-desegregation plan.
>
> "The Court holds and finds that thereafter the plan will be heard and it will be determined what to be done about it."

In this posture, the case came to the court of appeals for a stay order, the McWilliams class contending that they were being assigned to certain already-integrated schools because they were white, in violation of their constitutional rights not to be discriminated against solely because of their race, and that assignment to those schools would necessitate their transportation to said schools contrary to the Civil Rights Act of 1964, 42 U.S.C.A. §2000c-6(a), 78 Stat. 248.

REASONS THE WRIT SHOULD NOT BE GRANTED

1. The decision of the court below is not in conflict with any decision of this Court.

The court of appeals has decided no question contrary to any decision of this Court. The court of appeals has decided no question of national importance relating to the timing of public school desegregation. The court of appeals stayed an order of the district court, involving temporary and partial boundary changes (see trial court's remarks, Appendix, 6a) which raised constitutional and legal issues, until the trial court had considered and approved a full and comprehensive plan it had ordered presented.

2. The court of appeals has decided no important question of federal law.

The court of appeals has decided no important federal question. It merely postponed decision on the constitutional question presented by the McWilliams class until the school board had presented to the court, as the district court ordered, a comprehensive desegregation plan which might render moot the constitutional issue of racial discrimination against the McWilliams class raised by the piecemeal action of the trial court.

As recognized by Petitioners at page 25 of their Petition, the court of appeals realized that issuance of a stay, in effect, would determine the boundary changes for the 1969-1970 school year. Having determined that a stay should be granted (Appendix, 43a) pending the scheduled presentation of a comprehensive plan to the trial court, the court of appeals vacated the order of August 13 and remanded for consideration of the comprehensive plan. The order of the court of appeals was, by its language and reasoning, clearly intended as a stay order and, as such, does not require for its validity a finding of error or abuse of discretion by the trial court.

It is obvious that the court of appeals thought there was some substance to the constitutional issue presented by the McWilliams class, and that, balancing the competing interests, it appeared better in the public interest not to consider piecemeal the important questions inherent in the Oklahoma City situation (Appendix, 43a).

Mr. Justice Harlan stated in *O'Rourke, et al.* v. *Levine*, 80 S.Ct. 623, 4 L.Ed.2d 615 (Opinion in Chambers, March 5, 1960):

> "The Circuit Justice will not disturb, except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it."

The same considerations are applicable in a determination made by the whole court as to whether certiorari should be granted in this case to review the correctness of a decision on the issuance of a stay clearly within the discretion of the court of appeals. *American Construction Co.* v. *Jacksonville, T.&K.W.R. Co.*, 148 U.S. 372, 384; *Cobbledick* v. *United States*, 309 U.S. 323, 324-5; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258.

This Court should note that the court of appeals had heard extensive argument in the Oklahoma City case and in a somewhat similar case arising in Denver,[6] and had considered the briefs submitted. The Denver case is clearly distinguishable from the Oklahoma City case as the district judge in the Denver case had made a finding of deliberate segregation on the part of the school board and had granted an injunction.[7] No such situation is present in the Oklahoma City case.

This Court should also note that there was a difference of opinion between the trial judge and the school board as to whether the school board's active recruitment plan, which had been in effect less than a month, would in practice work. The majority of the school board thought its

---

[6]The Denver case was considered together with this case by the court of appeals as stated in its order (Appendix 42a).

[7]See: *Wilfred Keyes, et al.* v. *School District Number One, Denver, Colorado, et al.*, not yet reported; opinion of Mr. Justice Brennan in Chambers, August 29, 1969.

plan would work. The trial judge thought it would not and forced the school board to supplement the plan in accordance with the recommended boundary changes recommended by witness Wheat (Appendix, 6a, 9a). The court of appeals obviously was convinced that serious questions were presented by the McWilliams class which might disappear if a long-range plan were considered rather than a piecemeal solution which involved only two schools that were already fully integrated. Although Mr. Justice Brennan may have believed that an injunction was involved when he was requested to stay the order of the court of appeals, the case is not now and has never been in this posture. There can be no question about the power of the court of appeals to grant the stay. Rule 62(g), Federal Rules of Civil Procedure; Rule 8, Federal Rules of Appellate Procedure. The court of appeals obviously had a record before it sufficient to enable it to make a considered judgment as to whether a stay should issue.

In the court of appeal's consideration of the probability of success on the merits of Respondent's claims, there could be no question that the McWilliams class were assigned to Harding Junior High and Northeast High School *solely because they are white.* There was no reason for the change of school boundaries but to capture more white pupils for two schools which had student bodies comprised almost equally of both whites and blacks. The only reason for the assignment was the hope of establishing a greater ratio of whites to blacks in the schools. There could be no question that the transportation of these assigned pupils to the more remote schools would be required. Respondents did not claim before the court of appeals, nor would they

here, that race cannot be a consideration among the germane factors to be considered in establishing school boundary lines (see *Wanner* v. *County School Board of Arlington County, Va.*, 357 F.2d 452 (4th Cir. 1966)), but they did contend that when race is the *sole* consideration unequally applied, a violation of the Fourteenth Amendment occurs. The court of appeals was aware that this Court has never held that a district judge may impose his will upon a school board absent a showing that the school board is refusing to act to eliminate racial discrimination in public education, *Wanner* v. *County School Board of Arlington County, Va., supra,* at page 456, or that there must be a racial balance in every school. The court of appeals was cited decisions in other circuits that would make a thoughtful judge pause before dismissing the constitutional issues raised by the McWilliams class; such as: *Goss* v. *Board of Education of Knoxville, Tennessee,* 406 F.2d 1183 (6th Cir. 1969);[8] *Bell* v. *School City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964); and *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967). It was no doubt familiar with *Springfield School Committee* v. *Barksdale, Jr., et al.,* 348 F.2d 261 (1st Cir. 1965), in which the court of appeals reversed an order which required the school board to prepare and present a plan which would "eliminate to the fullest extent possible racial concentration . . . within the framework of effective educational procedures, as guaran-

[8]Decided subsequent to this Court's opinions in *Green* v. *School Board of New Kent County, Virginia,* 391 U.S. 430 (1968); *Raney* v. *Board of Education of the Gould School District,* 391 U.S. 443 (1968); and *Monroe* v. *Board of Commissioners of the City of Jackson, Tenn.,* 391 U.S. 450 (1968).

teed by the equal protection clause of the Fourteenth Amenment. . . ." The appellate court, after pointing out that other factors must be considered as well as race, said at page 264:

> "Certain statements in the opinion, notably that 'there must be no segregated schools,' suggest an absolute right in the plaintiffs to have what the court found to be 'tantamount to segregation' removed at all costs. We can accept no such constitutional right. Cf. Bell v. School City of Gary, 7 Cir., 1963, 324 F.2d 209, cert. den. 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; Downs v. Board of Education, 10 Cir., 1964, 336 F.2d 988, cert. den. 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800."

We submit that the court of appeals was correct in apparently concluding that there was substance to the constitutional and legal issues raised by Respondents below sufficient for it to conclude that a stay of the trial court's order regarding boundary changes should issue.

3. No Judge of the panel below was disqualified.

Petitioners assert that Chief Judge A. P. Murrah of the United States Court of Appeals for the Tenth Circuit was disqualified to participate in the decision below by 28 U.S.C. §47 which provides that "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." Judge Murrah sat on a statutory three-judge court in 1962[9] which entered an order finding the only issue before it was a factual one that did not address itself to a three-judge court, holding the court to be with-

[9]Petition for a Writ of Certiorari, pp. 8-10.

out jurisdiction and reassigning the case to the trial judge (Appendix, 47a). "[T]he sole criterion under the statute is, does the case in the circuit court of appeals involve a question which the judge has tried or heard in the course of the proceedings in the court below?" *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U.S. 339, 344 (1913). The only question "tried or heard" by Judge Murrah as a part of the three-judge statutory court was whether it had jurisdiction, a question that must be determined independently of the merits. Petitioners assert that the three-judge court sustained the school board's defense by quoting that part of the order which states:

> "It further appears from the evidence that there has been no order made or promulgated by the defendants acting under the above statute [70 Okla. Stat. 1961, Section 4-22], within the purview of 28 U.S. Code Section 2281, which the plaintiff presents or points out to be unconstitutional by discriminating against the plaintiff and his class by reason of race or color." (Appendix, 47a).

To the contrary, it is clear that the three-judge court was adverting to a lack of affirmative evidence sufficient to sustain a finding of jurisdiction under Section 2281. As shown in the trial judge's opinion[10] after the three-judge court was dissolved and a full trial was had, factual evidence introduced at the trial showed a course of conduct by the school board since 1955 first reduced to a formal written policy on April 10, 1963 (after the three-judge court had dissolved), known as the minority to majority transfer

---

[10] *Dowell* v. *School Board of Oklahoma City Public Schools*, 219 F. Supp. 427, 440-442 (W.D. Okla. 1963).

policy. It was this course of conduct which was held by the trial court to be an unconstitutional application of the statute involved, cited above in the quotation.

Respondents submit that the issues before the court of appeals in connection with its Motion for Stay did not involve "in any degree matter upon which he [Judge Murrah] had occasion to pass in the lower court." *Moran* v. *Dillingham*, 174 U.S. 153, 157 (1899). See also: *United States* v. *Perlstein*, 126 F.2d 789, 806 (3rd Cir. 1942), *cert. denied*, 316 U.S. 678 (1942); *Lee* v. *United States*, 91 F.2d 326, 331-332 (5th Cir. 1937), *cert. denied*, 302 U.S. 745 (1937).

Contrary to Petitioners' assertion, the issues before the court of appeals on Respondents' Motion to Stay did not include "whether the board is really complying with its duty under *Brown*, how fast desegregation must proceed, whether the schools have been fully desegregated or more must be done, [or] whether the board has affirmative obligations to change the segregated patterns."[11]

Where disqualification exists, this Court has held the remedy to be reversal and remand for consideration by a properly constituted court, rather than considering the case on the merits, pointing out that otherwise this Court would "be called upon, not to review the action of a court below, organized conformably to law, but to decide . . . questions which the law contemplated should be previously passed upon by an inferior court lawfully constituted." *Wm. Cramp & Sons S.&E.B. Co.* v. *International*

---

[11]Petition for a Writ of Certiorari, p. 29.

Curtis Marine Turbine Co., 228 U.S. 645, 651 (1913). The quoted language is particularly cogent in respect to Petitioners' suggestion to remand the case to the district court to carry out the steps contemplated by the August 13, 1969 trial court order.[12] The effect of adopting Petitioners' suggestion would be to decide Respondents' constitutional and other claims adversely to them without their appeal having ever been heard on its merits.

Although 28 U.S.C. §1254(1) authorizes review of a pending case by grant of a writ of certiorari to a court of appeals before judgment, Rule 20 of this Court states that such writ "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." There is no such showing here.

[12]The further steps contemplated are the submission by the school board to the district court of a full and comprehensive plan for desegregation. The stay order of the court of appeals, in effect, did not disturb this portion of the district court order (Appendix, 43a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

V. P. CROWE
100 Park Avenue Building
Oklahoma City, Oklahoma 73102
Counsel of Record for Respondents McWilliams, et al.

of Counsel:
C. HAROLD THWEATT
GEORGE S. GUYSI
100 Park Avenue Building
Oklahoma City, Oklahoma 73102

GEORGE F. SHORT
2401 First National Building
Oklahoma City, Oklahoma 73102

NORMAN E. REYNOLDS
2808 First National Building
Oklahoma City, Oklahoma 73102

October, 1969